

Legal Import of Inconsistent Design Specifications and Manufacturer Warranties

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ABSTRACT

Various issues can arise when design specifications are inconsistent with or contradict warranty requirements on a typical design-bid-build (DBB) project. In the typical DBB project, there are contractual rights and obligations created between the owner and the architect and the owner and the contractor, but not between the architect and the contractor. This dynamic can often lead to situations where the design specifications actually void the manufacturer's warranty.

This presentation will focus on three primary topics: 1) the delivery of warranty-compliant design specifications, 2) the legal rights and recourses available to owners, designers, specifiers, and manufacturers when the specifications are inconsistent with the warranty requirements, and 3) what courts have ruled when faced with situations involving inconsistent design specifications and warranty requirements.

How the legal system has treated ambiguous and/or uncertain terms between the project specifications and the warranties provided will be discussed. The potential impacts of unclear contract documents, including greater liability exposure and financial risk, will be presented. Best practices to avoid the potential consequences of voiding a manufacturer warranty will also be provided.

SPEAKERS



Brian Must has spent the past 20 years representing manufacturers, building owners, design-build firms, engineers, and contractors in the commercial roofing industry. He has represented various roofing entities in claims or litigation involving hospitals, schools and universities, government buildings, and high-rise condominiums. His experience ranges from negotiating and resolving commercial roofing claims and lawsuits to trying cases before federal and state courts and commercial arbitrations.



Josh Baker has represented roofing manufacturers and contractors in alleged roofing failure and contractor error disputes. He also has experience with overall claims management, including policies and procedure development and writing effective warranties.

Legal Import of Inconsistent Design Specifications and Manufacturer Warranties

You're in the middle of a five-year construction project to build a new office building for a client in a major metropolitan city. The client owns buildings both internationally and across the United States. However, this particular project will become the new headquarters and has been touted publicly as "the crown gem." This project is high-stress, expensive, and involves a variety of parties, including a major general contractor, a respected construction manager, myriad design professionals, subcontractors, and material suppliers. All of the stakeholders are working as part of a system in order to complete the project on time and on budget.

However, due in large part to the complexity of the project, the large and expensive equipment being used, and the manpower expended, complications have arisen and costs are starting to rise. One such complication involves the building enclosure. An intricate waterproofing system has been specified and the certified installer is now declaring that the system cannot be properly installed according to manufacturer specifications as the project is designed. The manufacturer will not warrant the product as designed, and the installer refuses to proceed until the issue is resolved. The project is being delayed as the installation of the waterproofing system is on the critical path. People are starting to point fingers as construction schedules are delayed and costs skyrocket. The parties are drawing lines in the sand and are unable or unwilling to complete work until certain conditions are met.

It is do-or-die time. How is the project going to be stabilized and put back on track? How are the parties going to figure out who is responsible for what, and how will the project be saved before funds dry up? And will the parties be able to resolve the disputes before the lawyers get involved and litigation is threatened or imminent?

The outcome of the dispute is largely dependent on the contractual relationships

and obligations owed among the parties. This article will discuss the potential issues that can arise when vague and conflicting plans, specifications, and warranties are utilized. Whether the job is new construction, the replacement of an existing roof, or a professional providing expert and litigation support services, the contract documents are a critical factor and an area where building owners rely upon the guidance of professionals in order to avoid unintended consequences.

GENERAL DESCRIPTION OF THE CONSTRUCTION PROCESS

In the typical design-bid-build (DBB) project, the owner engages the design professional to develop a design that meets the owner's needs. In addition to construction drawings, the design professional and its sub-consulting engineers prepare and compile a set of detailed technical requirements for the materials, design, products, and workmanship to be supplied on the project, which are commonly referred to as the design specifications.

The construction drawings and design specifications (which are referred to as the "design documents" in this article) are then ideally distributed to multiple contractors who submit bids or proposals based on a defined scope of work. The owner then chooses and engages its preferred contractor to construct the project as designed. The contractor engages and coordinates both subcontractors to perform defined portions

of work and suppliers to provide the materials necessary to complete the work as designed by the design professional.

Both contractors and manufacturers of the materials supplied provide important warranties to the owner. Contractors typically offer warranties covering workmanship and installation errors that manifest within a specified period of time—typically one year. Product and material manufacturers issue manufacturer warranties. A manufacturer warranty is a qualified promise made by a manufacturer that a defective product will be repaired or replaced if the product fails within a specified period of time—typically anywhere from 10 to 30 years.

Such warranties provide the comfort of knowing the extent to which the



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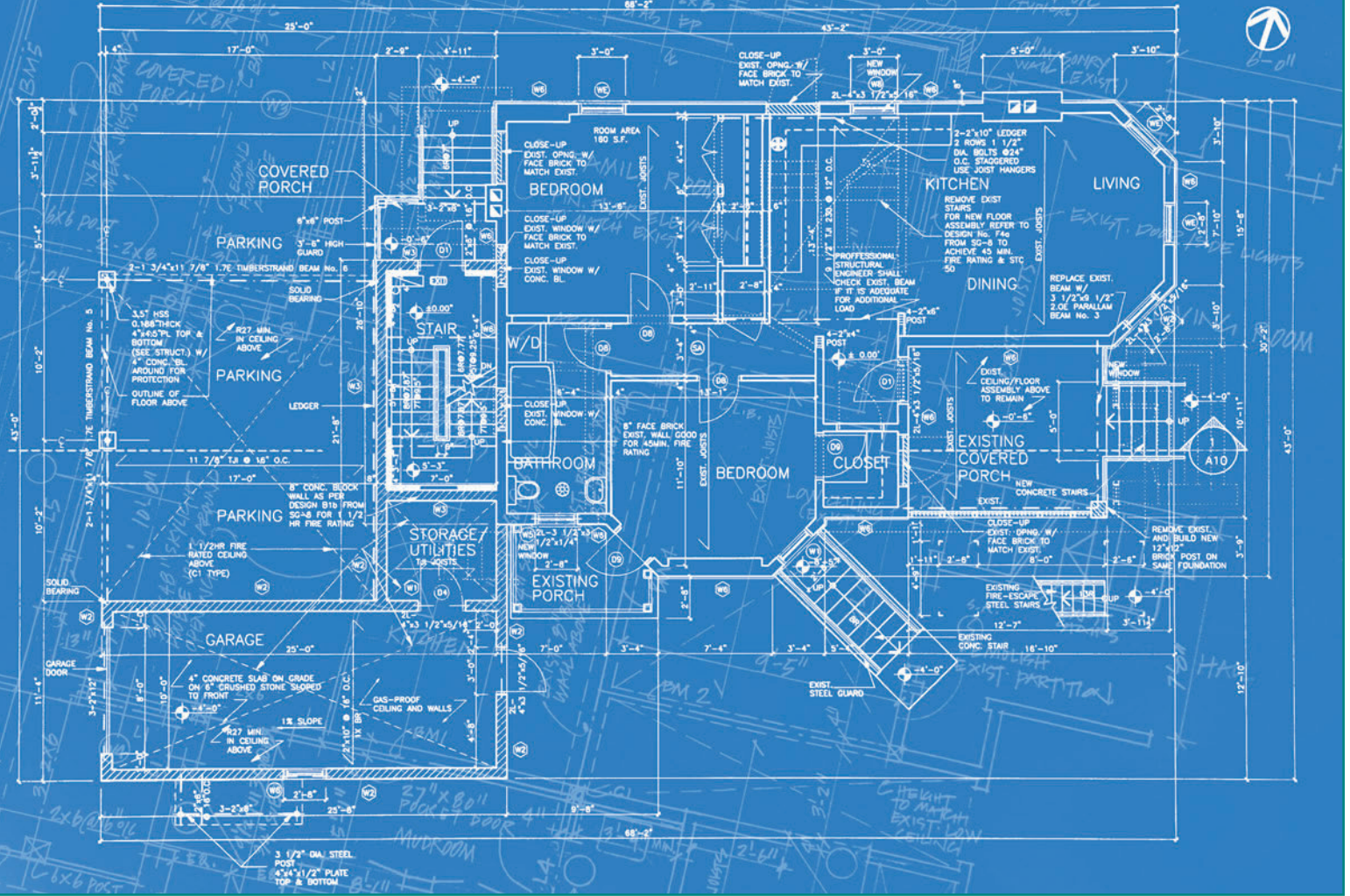


Figure 1 – Voiding a warranty for improper installation or not conforming to the manufacturer’s requirements can result in considerable, unintended expense.

manufacturer stands behind its product, while allowing the manufacturer to frame its potential liability to some degree. For example, manufacturers virtually always limit a warranty to failures resulting from a manufacturing defect and deem the warranty void in instances where the product was not installed or handled per the manufacturer’s requirements (i.e., the manufacturer specifications). Such limitations present issues on construction projects, which are essentially a conglomeration of many goods and specialized services—any number of which could potentially contribute to or cause product failure. And because product failure can have expensive consequences, among other things, project owners place great value on manufacturer warranties that minimize the risk of big-ticket material and equipment failure. Owners stand to lose considerable product value or face significant expense if, for example, a roofing warranty is voided due to an installer not conforming to the manufacturer’s warranty requirements (Figure 1).

For those reasons, it is important

that each party involved in the construction process has an understanding of its respective legal duties, obligations, responsibilities, and ultimate liabilities in the event of defective construction or instances where the design specifications and warranties do not align.

LEGAL DUTIES AND RESPONSIBILITIES

Construction is defective if it either does not conform to the contractual obligations or is performed in a manner that falls below the standard of applicable care. The types of construction defects and disputes are as diverse as the types of construction projects in existence today. Regardless of the nature of the dispute—be it work performed in an improper manner, no work performed at all, or inadequate project design—construction law is a veritable melting pot of doctrines, duties, and implied and expressed warranties.

“Construction law today is a primordial soup in the melting pot of law – a thick broth consisting of centuries-old legal theo-

ries fortified by statutory law and seasoned by contextual legal innovations reflecting the broad factual realities of the modern construction process.”¹ The legal duties and responsibilities on a construction project come from many places—whether it be the contract documents, express warranties, implied warranties, or common-law duties and responsibilities which have been imposed by the court system over the years. Each of these potential sources has the ability to impact how projects are run and ultimately how disputes are resolved or tried before a jury.

The Contract(s)

Construction and design disciplines have evolved and continue to evolve as owners, design professionals, contractors, and other project participants consider and collaborate on different project delivery methods. One constant, however, is the contract among the parties, which is the primary source used in defining the rights, responsibilities, obligations, and risks of those involved in the construction project.

The contract is the starting point for both a plaintiff's right to assert a claim and the defenses available to building professionals in response.

Moreover, the realities of the modern construction project involve overlapping and often conflated roles and responsibilities of designers, contractors, and other parties involved in the project (*Figure 2*). The various roles and responsibilities can be difficult to delineate, particularly when the proper amounts of time and attention are not given to the contract documents before the start of the construction process. The roles are often interwoven in separate but linked contractual agreements that include a variety of risk transfer mechanisms and elaborate dispute resolution procedures.

Because construction projects involve so many contracts that are both separate and interrelated at the same time, parties often utilize one of a handful of standardized contracts drafted by industry groups. These forms contain standard terms and conditions that can be modified to address unique aspects of a particular project. The contracts are intended both to provide consistency across the various relationships and to address common issues that arise in the course of a project.

Figure 2 – Construction projects can result in multiple overlapping and often conflated roles and responsibilities.



The American Institute of Architects (AIA) documents, are revised approximately every ten years, with the last revision in 2017. Historically, the AIA documents have been the most popular set of form documents on construction projects. Both because of their longevity and familiarity, the AIA documents are also most commonly used since one of the first contracts entered into on a project is with the design professional—commonly an architect—who is likely to propose using the AIA documents with the owner.

Regardless of what forms are used, standard contract documents have both advantages and disadvantages, and deliberate attention must be paid to account for the laws of a particular jurisdiction and any peculiarities of that jurisdiction. Additionally, there also may be specific needs in a project not addressed by any of the standard forms, and appropriate diligence should be given at the outset to ensure that the form contracts used conform to the specific construction project at issue.

Express Warranties

A party's performance can be defective because it fails to comply with the express or implied contractual obligations

assumed. "An express warranty promises that a specific result will be achieved – in contrast to a promise implied by law – namely, that the work of the professional conforms to the standards of his or her profession."² In other words, the "standard of performance is set by the defendants' promises, rather than imposed by law."³

One particular express warranty that is typically included in all standard contracts is a provision regarding quality of work. The AIA contract between the owner and contractor provides that "the Work, whether performed by Contractor's own personnel or by any Subcontractors, shall be first class in quality, free from all defects whatsoever ... and all Work not conforming to the requirements of [the Contract Documents] ... shall be considered defective."⁴

As a general rule, most courts recognize the potential chilling effect of finding express warranties (other than those explicitly stated) in the provision of design services. This is because express warranty claims are often asserted as a litigation tactic to avoid statutes of limitations and repose. For those reasons, most courts require plaintiffs to "put forth clear proof in supporting express warranty claims against design professionals."⁵



Figure 3 – The judicial system has also played an integral role in defining scope and responsibilities on construction projects.

Implied Warranties

In a typical construction project, the liability standard governing the reasonableness of a design professional's conduct differs from the standard applicable to the owner and the contractor.⁶ "Generally, an owner provides an implied warranty to the contractor that the prescriptive plans and specifications are free from defects."⁷ Commonly known as the Spearin doctrine or the Spearin warranty, the contractor is contractually bound to the owner to build according to a certain set of plans and specifications and will not be responsible for the "consequences of defects in the plans and specifications."⁸

In American jurisprudence, "it is well established that where one party furnishes plans and specifications for a contractor to follow in a construction job, and the contractor in good faith relies thereon, the party furnishing such plans impliedly warrants their sufficiency for the purpose intended."⁹ The Spearin warranty is inapplicable, however, to performance specifications, which may be utilized for specialty trade designs.

In addition to a potential defense to liability, the contractor may also seek to

hold the owner liable for the additional amount of expense required to complete the project resulting from the inaccuracy within the contract documents. If the contractor followed the plans and specifications set forth by the owner and the contractor was not negligent in doing so, the contractor should not be liable for any resulting deficiencies caused by the defective plans and specifications.

The contractor also has an implied duty to seek clarification, prior to submitting a bid or price, of "obvious discrepancies, ambiguities, conflicts, or omissions in the owner's design or other contract documents."¹⁰ Contractors who fail to seek clarification do so at their own peril and cannot later claim extra compensation after the discrepancy is corrected. For an owner to avoid liability on this type of claim, the owner must show that 1) the issue in the contract documents was an obvious discrepancy and 2) the contractor knew or should have known of the discrepancy. The owner is not required to prove that the contractor was actually aware of the issue; rather, that the contractor reasonably should have known about the discrepant issue.

Common Law Duties Imposed by Courts

In addition to the contract documents, express warranties, and warranties implied by law, duties and responsibilities on a construction project have also been created through many years of case law and court decisions (*Figure 3*). While some of the common-law duties imposed by courts are often basic and common knowledge, there are others that have been created that are not always at the forefront of a professional's mind during a construction job.

Covenant of Good Faith and Fair Dealing

There is an implied promise of good faith and fair dealing in every construction contract, which provides that each party will not unfairly interfere with the right of the other to receive the benefits of the contract.¹¹ The covenant of good faith and fair dealing may differ slightly depending on the applicable state law, but as a general rule, the covenant is breached if a party establishes that: 1) it did all or substantially all of the material things required by the contract, 2) all conditions required for the other party's performance had occurred, 3) the party unfairly interfered with the other

party's right to receive the benefits of the contract, and 4) the non-breaching party suffered damages as a result of the conduct by the breaching party.

Duty to Provide Access to the Worksite

The owner must provide the contractor with reasonable access to the worksite when entering into a construction contract.¹² Most courts will only hold the owner responsible for additional costs and time associated with the delay if the contractor is not able to access the site. To establish a claim based on a failure to provide access to a worksite, the contractor must prove that: 1) the contract required the contractor to perform the work at a specified time or on a designated date, 2) the contractor could not start working at that time through no fault of his or her own, and 3) the cause of the delay was due to the owner's failure to provide the contractor reasonable access to the worksite.

The duty to provide site access also means that an owner dealing with multiple prime contractors must ensure coordination. For example, if a notice to proceed is issued but the contractor cannot access the site due to another contractor's presence on the site, the owner is technically in breach. This obligation extends throughout the course of the project.

Duty to Provide Accurate Site Information

Related to the Spearin doctrine, the owner has a duty to provide accurate information about the site. Any claim based on a failure to provide accurate site information is highly fact-specific and dependent on each particular situation. General principles of the law, however, will permit recovery when the evidence shows that the owner provided inaccurate information which the contractor was unaware of and the contractor's reliance on that information had a material impact on the contractor's work. Often, whether the contractor should have discovered the owner's failure to provide accurate site information and the materiality of the impact are heavily disputed and fact-dependent.

Duty to Maintain Construction Site in Reasonably Safe Condition

A general contractor is required to maintain the construction site over which it has control in a reasonably safe condition.¹³ When a person is injured on the worksite and litigation ensues, the primary question is whether the contractor had control over the area of the worksite where the incident occurred. Assuming that is satisfied, the next issue is whether the contractor failed to take reasonable action to maintain the site in a reasonably safe condition and whether the incident would not have happened but for the contractor's failure to take reasonable precautions.

CONFLICTS BETWEEN DESIGN DOCUMENTS AND MANUFACTURER SPECIFICATIONS

In the DBB context, design professionals issuing a design specification (i.e., one that specifies particular building materials or equipment to be used) are communicating to the owner and the contractor that the specified material or equipment is appropriate for the application indicated in the design documents. Design professionals regularly specify products or systems for use in a project based on relationships with vendors, experience with the product, and/or heightened requirements of a par-

ticular project. In purchasing the product as part of the project, the owner rightfully expects to receive the benefit of the manufacturer warranty. To be in compliance with the general contract, the contractor (and its subcontractors) must provide and use the specified product or system or request permission to substitute another. Design professionals often integrate the product requirements into the design by either attempting to provide comprehensive detail or by merely incorporating the manufacturer specifications into the design documents (*Figure 4*). Conflicts between the design documents and the manufacturer specifications can occur in either case. Manufacturers often seek to void the warranty in instances where the product was not installed or handled per the manufacturer's instructions.

Providing comprehensive detail may result in design documents that are unintentionally ambiguous, incomplete, or directly contradictory to the manufacturer specifications. This may be the result of a lack of available information about the product or a failure to perform the necessary due diligence to understand the product requirements for a particular application. Incorporation by simply requiring that the product be installed per manufacturer specifications may seem like the safer alternative that presumably covers all of the bases, but this approach also has the potential to present conflicting guidance.

For instance, the product may not actually be appropriate for the project for which it is specified, or the manufacturer specifications may be inherently ambiguous or incomplete such that an important detail is overlooked or omitted. Likewise, because construction project design is dynamic and subject to change throughout the life of the project, design changes to accommodate design errors or unforeseen conditions may have unintended consequences relating to the use of the product that could result in the warranty being voided.

Conflicts between the design documents and the manufacturer specifications, if not promptly caught and resolved, can manifest during construction in a number of ways that have the potential

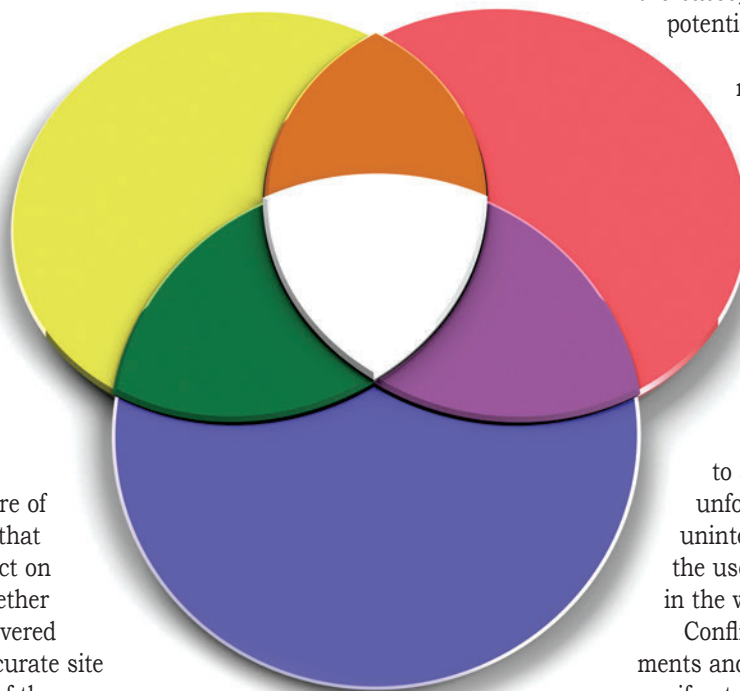


Figure 4 – A successful construction project starts at the outset with the design documents.



The language in the contract documents should be fully understood by the owner and all other parties involved in the construction process.

to void the manufacturer warranty. The following are a few examples.

Dimensional Conflicts/ Physical Obstructions

Following the design specifications may result in insufficient space or unavoidable physical obstructions that prevent installation or use of the product consistent with the manufacturer specifications. For example, an as-designed perforation through a waterproofing membrane may be placed too close to immovable obstructions to allow for the use of the manufacturer's required method for sealing the hole. This could result in a contractor that strictly follows the project drawings and specifications discovering mid-project that it is unable to proceed in compliance with the manufacturer specifications. In this instance, the warranty is likely voided.

Material Incompatibility

The chemical composition or other characteristics of the product or system might be functionally incompatible with other products included in or allowed by the design specifications. For example, EPDM rubber roofing is known to degrade and become brittle when it comes in direct contact with bituminous material. If the design specifications call for use of a bituminous material for another aspect of the project and it comes in contact with the EPDM roof, the roof has the potential to fail in some manner in the foreseeable future and the warranty will likely be void.

Improper Installation or Sequencing

The design specifications may require or allow an action or construction sequencing that is inconsistent with the proper installation or use of the product or system. For example, the approved schedule calls for the warranted product to be

installed before an activity that the manufacturer would require it to follow. This could result in damage to the product that is not covered by the warranty.

IMPORTANCE OF TIMING

Depending on when the conflict between the design documents and the manufacturer specifications are realized, the approach to resolution of the conflict can be drastically different. If caught during the design phase, the perceived conflict can be corrected by returning to the drawing board. The design professional reevaluates the use of the product in the project and modifies the design documents accordingly. While responsibility for redesign cost and lost time may be at issue, this is the best-case scenario because the warranty has not been voided and the project is subjected to minimal redesign delay.

If the conflict between the design documents and the manufacturer specifications is not caught until after construction has commenced but prior to performance of the work that is the subject of the conflict, the project may grind to a complete halt. The contractor will not want to be held responsible for the warranty being voided. Both the contractor and the design professional will seek input and consultation from the manufacturer. The manufacturer will insist on strict adherence to the manufacturer specifications before standing by its warranty. The question in everyone's mind will be this: What is the contractor required to provide pursuant to its contract with the owner? In other words, do design documents or manufacturer specifications govern, and who is responsible for the changes necessary for the manufacturer warranty to be issued?

If the conflict between the design documents and the manufacturer specifications is not caught until after work is completed, the warranty is likely voided and the par-

ties will be left to dispute responsibility and liability for the lost product value or, in the worst-case scenario, liability for product failure. It is vitally important to identify and resolve conflicts during the design phase to avoid issues of this type.

RESPONSIBILITY FOR DESIGN DOCUMENTS

In the typical DBB project, there are contractual rights and obligations created between the owner and the design professional and the owner and the contractor, but not between the design professional and the contractor. The owner engages the design professional to develop a design that meets the owner's needs. The owner then engages the contractor to construct the owner-provided design. Due to this dynamic and pursuant to the Spearin doctrine, the owner is potentially responsible to the contractor for any deficiencies in the design. The owner subsequently may choose to seek recovery from the design professional if there is some cognizable claim of breach of contract or professional negligence. In other words, there are not direct lines of responsibility and liability, and responsibility and liability for conflicts may not lie with the same parties.

The installer of a specified product or system is generally permitted to reasonably rely on the completeness and accuracy of the information contained in the contract documents. The installer may take comfort in knowing that strict adherence to the contract documents will, in all likelihood, protect it from liability for contractual breach. After all, it is certainly reasonable to assume that a design professional who a) specifies the use of a particular product or system or b) lists a number of acceptable alternative products or systems is sufficiently aware of the manufacturer specifications to ensure that its use is consistent with the rest of the project as designed. It is arguably within the design professional's standard of care to thoroughly understand a product's limitations and warranty requirements when calling for its use in a design specification. Proper installation and handling should be consistent with and reflected in drawings and specifications. A failure to do so can result in significant costs with no warranty recourse. If the product later fails, the manufacturer will most likely not honor its warranty as a result of the contractor's failure to follow

the manufacturer's instruction. This result could have been avoided if the design professional had conformed its design to the warranty requirements. The design professional may be held liable for the design failure that resulted in the warranty being rendered void.

However, it would be incorrect to conclude that the design professional is automatically responsible and liable for all instances of dimensional conflicts, material incompatibility, or improper installation or sequencing. While incomplete or ambiguous drawings and specifications may be the genesis of the problem, it also must be remembered that a design professional's standard of care is not an expectation of perfection. A design professional is expected to perform with the skill and care of a reasonable design professional in similar circumstances. It is not unimaginable that there are circumstances where the owner is responsible for providing design documents that conflict with manufacturer specifications to the contractor but is unable to recover from the design professional because the design professional complied with its contractual requirements and met its standard of care.

The Design Professional's Responsibility

It is necessary to engage an expert to establish that a particular conflict between the design specifications and the manufacturer's specifications is a breach of the design professional's standard of care. This is a decision made on a case-by-case basis. To avoid this uncertainty, the owner should ensure that delivery of a warranty-compliant design is a material term of the design professional's contract. While this duty is arguably within the design professional's standard of care, express language reinforces the obligation and provides for a longer period of time to bring the claim under the applicable statute of limitations.

This is especially important where the design professional's design specifies the materials to be used. If the contractor follows the plans and specifications and the warranty is voided as a result, the contractor has an argument that it was the design that voided the warranty, not the contractor. If the design is shown to be inconsistent with or contradictory to warranty requirements and the contractor followed the design in good faith, the owner will

likely not be entitled to recover for resulting losses from the contractor. It is vitally important that the design professional is familiar with the warranty requirements and tailors its design to meet such requirements. The owner is the only party that has the power to require this from the design professional and to enforce such a requirement. Making this a contractual obligation strengthens the arguments that the design professional should have better understood the manufacturer's specifications and warranties.

The Installer Contractor's Obligations and Role

In the DBB context, the contractor's primary obligation is to construct the project in accordance with the design documents. Strict adherence to the contract requirements should insulate the contractor from responsibility for a voided warranty. In the event that a conflict between the design documents and manufacturer specifications comes to the attention of the contractor, it is imperative that the contractor alert the owner and design professional immediately through submission of a request for information (RFI) and, perhaps, request a design directive from the design professional. When the manufacturer specifications are incorporated into the design documents such that the contractor is instructed to install the product in accordance with the manufacturer specifications, the need for examination and understanding of the manufacturer specification is heightened.

While the contractor is, in most cases, not a design professional and should not be expected to fill that role, it has submitted a bid on work that includes an inherent conflict. A certified installer, who is presumed to have superior expertise in the requirements and nuances of the product, should take special care to root out such conflicts early in the project or risk shared responsibility for the warranty being voided. This is especially true when the warranty is voided due to means and methods employed by the installing party. In such an instance, the design professional may or may not have had an obligation to provide further guidance in the design specifications to protect the viability of the warranty. On the other hand, the contractor may or may not have had an even stronger obligation to submit an RFI seeking clari-

fication or to make itself independently aware of the warranty requirements.

Many contracts require the contractor to deliver warranties upon completion of the project. While this is helpful and strengthens the case that the contractor is responsible to be diligent in protection of the warranty, this in and of itself does not override the owner's warranty of the plans and specifications. Specification writers should also clearly identify the warranty that is required to be delivered as part of the completed project. All warranties are not created equal, varying in length and scope. An owner expecting a manufacturer warranty from a respected and reputable source will be disappointed to learn that the manufacturer warranty is voided by the contractor's means and methods, but the contractor's parts and labor warranty meets the requirements of a vague and ill-defined warranty specification.

The resolution of the issues arising from conflicts between design documents and manufacturer specifications is highly case specific, but it comes down to the contractual obligations among the project participants as viewed through the prism of the legal duties owed between each of them.

CLEAR AND DEFINITIVE TERMS ARE CRITICAL TO PROJECT SUCCESS

The contract documents, for those responsible for completing the work, can sometimes seem like an insignificant event during the life of a major construction project. However, the language, terms, and conditions of the contract—including the plans, specifications, and warranties—are critical areas that can lead to major complications down the line or can be used to stop minor issues from being catastrophic failures of the process. When faced with multiple bids to construct a building, the warranties being offered by each manufacturer should also play a role in the decision-making process. The language in the contract documents should be fully understood by the owner and all other parties involved in the construction process. Failing to understand the import of the contract documents can have serious intended and unintended consequences and has the potential to carry significant risks throughout the life of the project.



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